

**REMARKS**

Claims 1-13 are currently pending. Claims 2 and 12 have been withdrawn. Therefore, Claims 1, 3-11 and 13 are under consideration. The Listing of Claims provided above is identical to the Listing of Claims provided in Applicants' September 30, 2008 Amendment and Response and in Applicant's June 23, 2009 Amendment and Response. Applicants believe that Applicants' previous Responses are still controlling for all areas not addressed by this Supplemental Response.

**NOTICE OF NON-COMPLIANT AMENDMENT**

On April 30, 2008, the PTO issued a Final Office Action that provisionally rejected the claims on the grounds of non-statutory, obviousness-type double patenting. In a September 30, 2008 Amendment and Response, Applicants respectfully submitted that Applicants could not properly evaluate the merits of the provisional double patenting rejections until such time that the Examiner identified allowable subject matter. Applicants stated that once the Examiner identified allowable subject matter, Applicants would consider the filing of a terminal disclaimer. Nevertheless, rather than withdraw these provisional double patenting rejections until such time that the provisional status could be removed, the Examiner issued a Notice of Non-Compliant Amendment that required Applicants to provide substantive arguments directed to the non-statutory, obviousness-type double patenting rejections.

In the Notice of Non-Compliant Amendment dated January 9, 2009, the Examiner stated that "a complete response (if a terminal disclaimer is not filed) must include substantive arguments directed to the obviousness-type double patenting rejections. See 37 CFR 1.111." Applicants note that 37 C.F.R. § 1.111, which addresses whether a response is a bona fide response and compliant, states:

In order to be entitled to reconsideration or further examination, the applicant or patent owner must reply to the Office action. The reply by the applicant or patent owner must be reduced to a writing which distinctly and specifically points out the supposed errors in the examiner's action and must reply to every ground of objection and rejection in the prior Office action. The reply must present arguments pointing out the specific distinctions believed to render the claims, including any newly presented claims, patentable over any applied references. If the reply is with respect to an application, a request may be made that objections or requirements as to form not necessary to further consideration of the claims be held in abeyance until allowable subject matter is indicated. The applicant's or patent owner's reply

must appear throughout to be a bona fide attempt to advance the application or the reexamination proceeding to final action. A general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references does not comply with the requirements of this section.

Applicants respectfully submit that Applicants' previous two Responses comply entirely with 37 C.R.F. § 1.111. The Examiner admitted as much on page 2 of Notice of Non-Compliant Amendment where the Examiner conceded this point by stating "Since the above-mentioned reply appears to be bona fide . . . ."

Specifically, to comply with 37 C.F.R. § 1.111, Applicants provided substantive arguments to the multiple 35 U.S.C. § 103(a) rejections and properly addressed the provisional double-patenting rejections. Applicants explained that once the Examiner removed the provisional status of the double patenting rejections by allowing one of the pending applications, Applicants would take appropriate steps in the appropriate application. For example, Applicants noted that the M.P.E.P. does not contain language that requires Applicants to file substantive arguments directed at the double patenting rejections in lieu of filing a terminal disclaimer. In fact, and quite to the contrary, Applicants also noted as the present application is the parent application, the M.P.E.P. indicates that "a terminal disclaimer filed in a parent application normally has no effect on a continuing application claiming filing date benefits of the parent application under 35 U.S.C. 120." M.P.E.P. § 1490. Applicants repeatedly expressed a willingness to file a terminal disclaimer in either or both U.S. Application Serial Nos. 11/472,536 and 11/638,311 once the present application issues as a patent (assuming that the claims in those applications are determined to be obvious variants over any allowed claims in the present application).

Therefore, because Applicants' previous two Responses comply with the rules governing provisional double patenting rejections and showed an effort to advance prosecution, Applicants' Responses are fully responsive and should be considered on the merits. Applicants respectfully submit that the standard noted above for responsiveness has been met. Therefore, Applicants respectfully request that Examiner withdraw this Notice.

**INTERVIEW SUMMARY**

Following the submission of Applicants' June 23, 2009 Amendment and Response, Applicants' Representatives and Examiners H. Ahmed and H. Sheikh conducted a third telephonic interview to discuss the non-statutory, obviousness-type double patenting rejections and the Notice of Non-Compliant Amendment. Applicants would like to thank Examiners Ahmed and Sheikh for their helpful comments and insights regarding what Examiners Ahmed and Sheikh require for an amendment to be considered responsive. The Examiners indicated that Applicants' June 23, 2009 Response did not provide substantive arguments against the provisional non-statutory, obviousness-type double patenting rejections. To overcome the Notice of Non-Compliant Amendment issued January 9, 2009, the Examiners indicated that Applicants need to file a supplemental response containing substantive arguments directed to merits of the provisional non-statutory, obviousness-type double patenting rejections.

Applicants respectfully submit that the Examiner is incorrect in requiring Applicants to submit substantive arguments directed against the provisional non-statutory obviousness-type double patenting rejections. While Applicants maintain that there is no legal basis for requiring such substantive arguments, Applicants see no other viable way to move prosecution forward for this application. Thus, Applicants now submit a Supplemental Response to the Notice of Non-Compliant Amendment.

**REJECTION OF CLAIMS 1, 3-11, AND 13 UNDER NONSTATUTORY DOUBLE PATENTING**

**A. CO-PENDING U.S. PATENT APPLICATION SERIAL NO. 11/472,536**

Prior to April 30, 2008, Claims 1-13 were pending in the present application. Claims 2 and 12 had been withdrawn. Claim 1 was the only independent claim in the present application. Claims 3-11 and 13 depended from independent Claim 1, which was directed to a method for preparing a mineral composition that has a low pH comprising (a) providing a clay soil having (i) a selected minimal concentration of cadmium, lead, arsenic, and mercury, (ii) at least eight macro mineral elements, (iii) at least sixty micro mineral elements, (iv) at least ten rare earth elements, (v) at least four percent by weight calcium, (vi) at least four percent by weight silica; and, (b) processing said clay soil by (i) admixing said soil with water and at least one acid to produce a slurry, (ii) allowing particles to settle from said slurry to produce a liquid containing at least eight macro mineral elements and at least sixty micro mineral elements, (iii) concentrating

said liquid to increase the concentration of mineral elements in said liquid to greater than 4% by weight.

On April 30, 2008, the PTO issued a Final Office Action that provisionally rejected Claims 1, 3-11, and 13 as being unpatentable on the grounds of non-statutory, obviousness-type double patenting over Claims 1-7 of co-pending U.S. Application Serial No. 11/472,536 ("the '536 application"). The Office Action states that "although the conflicting claims are not identical, they are not patentably distinct from each other because the '536 claims a topical mineral composition comprising at least eight macro mineral elements, at least sixty micro mineral elements and at least ten rare earth elements (Claim 1)." (April 30, 2008 Final Office Action, pp. 6-7). Applicants respectfully traverse this rejection.

As of April 30, 2008, the claims of co-pending U.S. Application Serial No. 11/472,536 were directed to a method for mammalian skin exfoliation comprising topically applying to the skin a dry hygroscopic powder composition comprising a therapeutically effective amount of a mineral extract composition, wherein the mineral extract composition results from an extraction of a soil comprising (a) at least eight macro mineral elements; (b) at least sixty micro mineral elements; and (c) at least ten rare earth elements.

On September 30, 2008, in an Amendment and Response to the Final Office Action for the present application, Applicants amended independent Claim 1. Similarly, in a July 6, 2009 Amendment and Response, Applicants amended the claims of co-pending U.S. Application Serial No. 11/472,536. Because the claims that existed as of the April 30, 2008 Office Action are not the same claims that exist as of the filing of this Response, Applicants respectfully submit that the claim amendments are a sufficient basis to warrant the withdrawal of the double patenting rejection.

Furthermore, Applicants note that the Examiner has not made clear what claims should be considered in Applicants' arguments directed to the merits of the double patenting rejections. For example, since the April 30, 2008 Final Office Action, Applicants have amended the claims of the present application and the claims of co-pending U.S. Application Serial No. 11/472,536. If Applicants' provide arguments directed to the double patenting rejection of the claims that were pending as of the April 30, 2008 Final Office Action, then Applicants respectfully submit that this would be an exercise in futility. The claims that existed as of the April 30, 2008 Office Action are not the same claims that exist as of the filing of this Response. Therefore, Applicants

respectfully submit that trying to provide substantive arguments against the provisional double-patenting rejections of claims that are continuously being amended is the equivalent to trying to shoot a moving target while on the run. Such an exercise is also a waste of the Examiner's time. Applicants submit that because the Examiner has not the opportunity to re-evaluate the double patenting rejections in light of these claim amendments, the double patenting rejections are prima facie inappropriate and should be withdrawn.

Nevertheless, solely in an effort to move forward the prosecution of this application, Applicants respectfully submit that the currently pending claims of the present application are not obvious over co-pending U.S. Application Serial No. 11/472,536. The currently pending claims of the present application are now directed to a method for preparing a mineral composition that has a low pH comprising (a) providing a clay soil having (i) a selected minimal concentration of cadmium, lead, arsenic, and mercury, (ii) at least eight macro mineral elements, (iii) at least sixty micro mineral elements, (iv) at least ten rare earth elements, (v) at least four percent by weight calcium, (vi) at least four percent by weight silica; and, (b) processing the clay soil by (i) admixing the soil with water and at least one acid to produce a slurry, (ii) allowing particles to settle from the slurry to produce an acidic liquid comprising at least eight macro mineral elements and at least sixty micro mineral elements, (iii) separating the acidic liquid comprising at least eight macro mineral elements and at least sixty micro mineral elements from the settled particles, and (iv) concentrating the separated acidic liquid to increase the concentration of mineral elements in the acidic liquid to greater than 4% by weight. The currently pending claims of co-pending U.S. Application Serial No. 11/472,536 are now directed to a method for mammalian skin exfoliation comprising topically applying to the skin a dry hygroscopic powder composition comprising a therapeutically effective amount of a mineral extract composition and an edible acid, wherein the mineral extract composition results from an extraction of a soil and comprising (a) at least eight macro mineral elements; (b) at least sixty micro mineral elements; and (c) at least ten rare earth elements.

Applicants submit that that the currently pending claims of co-pending U.S. Application Serial No. 11/472,536 application fail to teach or suggest a method for preparing a mineral composition having a low pH as Applicants currently claim. Contrary to the Office Action's statement that the present claims are obvious because "the '536 claims a topical mineral composition comprising at least eight macro mineral elements, at least sixty micro mineral

elements and at least ten rare earth elements (Claim 1),” Applicants submit that the claims of co-pending U.S. Application Serial No. 11/472,536 fail to teach or suggest to one of skill in the art a clay soil having at least four percent by weight calcium, at least four percent by weight silica, or a selected minimal concentration of cadmium, lead, arsenic, and mercury. (See currently pending Claim 1 of the present application).

For at least these reasons, Applicants respectfully submit that the withdrawal of the provisional non-statutory, obviousness-type double patenting rejections is warranted.

**B. CO-PENDING U.S. PATENT APPLICATION SERIAL NO. 11/638,311**

Claims 1, 3-11, and 13 are provisionally rejected on the ground of non-statutory, obviousness-type double patenting as being unpatentable over Claim 1 of the co-pending U.S. Patent Application Serial No. 11/638,311. Applicants respectfully traverse this rejection.

Prior to April 30, 2008, Claims 1-13 were pending in the present application. Claims 2 and 12 had been withdrawn. Claim 1 was the only independent claim in the present application. Claims 3-11 and 13 depended from independent Claim 1, which was directed to a method for preparing a mineral composition that has a low pH comprising (a) providing a clay soil having (i) a selected minimal concentration of cadmium, lead, arsenic, and mercury, (ii) at least eight macro mineral elements, (iii) at least sixty micro mineral elements, (iv) at least ten rare earth elements, (v) at least four percent by weight calcium, (vi) at least four percent by weight silica; and, (b) processing said clay soil by (i) admixing said soil with water and at least one acid to produce a slurry, (ii) allowing particles to settle from said slurry to produce a liquid containing at least eight macro mineral elements and at least sixty micro mineral elements, (iii) concentrating said liquid to increase the concentration of mineral elements in said liquid to greater than 4% by weight.

On April 30, 2008, the PTO issued a Final Office Action that provisionally rejected Claims 1, 3-11, and 13 as being unpatentable on the grounds of non-statutory, obviousness-type double patenting rejections over Claim 1 of co-pending U.S. Application Serial No. 11/638,311. The Office Action states that “although the conflicting claims are not identical, they are not patentably distinct from each other because the ‘311 claims a topical mineral composition comprising at least eight macro mineral elements, at least sixty micro mineral elements and at least ten rare earth elements (claim 1).” (April 30, 2008 Final Office Action, p. 7).

As of April 30, 2008, the claims of co-pending U.S. Application Serial No. 11/638,311 were directed to a method for providing antioxidants to mammalian skin, comprising applying to a skin surface an effective amount of a dry hygroscopic powder composition comprising a mineral extract composition having antioxidant properties comprising at least eight macro elements, wherein silicon is less than 1%; at least sixty micro elements; and at least ten rare earth elements.

In Applicants' September 30, 2008 Amendment and Response to the Final Office Action, Applicants amended independent Claim 1. Similarly, in an April 20, 2009 Amendment and Response, Applicants amended the claims of co-pending U.S. Application Serial No. 11/638,311. Because the claims that existed as of the April 30, 2008 Office Action are not the same claims that exist as of the filing of this Response, Applicants respectfully submit that the claim amendments are a sufficient basis to warrant the withdrawal of these double patenting rejections.

Furthermore, Applicants note that the Examiner has not made clear what claims should be considered in Applicants' arguments directed to the merits of the double patenting rejections. For example, since the April 30, 2008 Final Office Action, Applicants have amended the claims of the present application and the claims of co-pending U.S. Application Serial No. 11/638,311. If Applicants' provide arguments directed to the double patenting rejection of the claims that were pending as of the April 30, 2008 Final Office Action, then Applicants respectfully submit that this would be an exercise in futility. The claims that existed as of the April 30, 2008 Office Action are not the same claims that exist as of the filing of this Response. Therefore, Applicants respectfully submit that trying to provide substantive arguments against the provisional double-patenting rejections of claims that are continuously being amended is the equivalent to trying to shoot a moving target while on the run. Such an exercise is also a waste of the Examiner's time. Applicants submit that because the Examiner has not the opportunity to re-evaluate the double patenting rejections in light of these claim amendments, the double patenting rejections are *prima facie* inappropriate and should be withdrawn.

Nevertheless, solely in an effort to move forward the prosecution of this application, Applicants respectfully submit that the currently pending claims of the present application are not obvious over co-pending U.S. Application Serial No. 11/638,311. The currently pending claims of the present application are now directed to a method for preparing a mineral

composition that has a low pH comprising(a) providing a clay soil having (i) a selected minimal concentration of cadmium, lead, arsenic, and mercury, (ii) at least eight macro mineral elements, (iii) at least sixty micro mineral elements, (iv) at least ten rare earth elements, (v) at least four percent by weight calcium, (vi) at least four percent by weight silica; and, (b) processing the clay soil by (i) admixing the soil with water and at least one acid to produce a slurry, (ii) allowing particles to settle from the slurry to produce an acidic liquid comprising at least eight macro mineral elements and at least sixty micro mineral elements, (iii) separating the acidic liquid comprising at least eight macro mineral elements and at least sixty micro mineral elements from the settled particles, and (iv) concentrating the separated acidic liquid to increase the concentration of mineral elements in the acidic liquid to greater than 4% by weight. The currently pending claims of co-pending U.S. Application Serial No. 11/638,311 are directed to a method for providing antioxidants to mammalian skin, comprising applying to a skin surface an effective amount of a dry hygroscopic powder composition comprising a mineral extract composition having antioxidant properties comprising at least eight macro elements, wherein silicon is less than 1%; at least sixty micro elements; and at least ten rare earth elements.

Applicants submit that that the currently pending claims of co-pending U.S. Application Serial No. 11/638,311 fail to teach or suggest a method for preparing a mineral composition having a low pH as Applicants currently claim. Contrary to the Office Action's statement that the present claims are obvious because other because "the '311 claims a topical mineral composition comprising at least eight macro mineral elements, at least sixty micro mineral elements and at least ten rare earth elements (claim 1)," Applicants submit that the claims of the co-pending U.S. Application Serial No. 11/472,536 fail to teach or suggest to one of skill in the art a clay soil having at least four percent by weight calcium, at least four percent by weight silica, or a selected minimal concentration of cadmium, lead, arsenic, and mercury. (See currently pending Claim 1 of the present application).

For at least these reasons, Applicants respectfully submit that the withdrawal of the provisional non-statutory, obviousness-type double patenting rejections is warranted.

#### CONCLUSION

For at least the reasons stated above, Applicants submit that the Applicants' Responses are compliant. Applicants respectfully request that the Examiner withdraw the Notice of Non-



Compliant Amendment, withdraw the provisional double-patenting rejections, and allow these claims.

Applicants file this response solely to facilitate prosecution. As such, Applicants reserve the right to pursue claims of broader or similar scope as originally filed in a continuation application or other application after allowance of the present application. Applicants do not concede that the current or past rejections are correct and reserve the right to challenge such rejections later in prosecution or on appeal. Accordingly, any amendment, argument, or claim cancellation is not to be construed as abandonment or disclaimer of subject matter. Because certain of the current amendments may include broadening amendments, Applicants respectfully request the Examiner to revisit any previously reviewed references cited in this Application to further ensure that the currently pending claims remain patentable over any previously reviewed references.

If the Examiner believes there are other issues that can be resolved by a telephone interview, or that there are any informalities that remain in the application which may be corrected by the Examiner's amendment, then a telephone call to the undersigned attorney at (678) 420-9428 is respectfully solicited.

Applicants do not believe that a fee is due; however, Applicants hereby authorize the Commissioner to charge to Deposit Account No. 14-0629 any fees that may be required.

Respectfully submitted,

/MaryAnthonyMerchant Reg. No. 39,771/  
Mary Anthony Merchant, Ph.D.  
Reg. No. 39,771

BALLARD SPAHR ANDREWS & INGERSOLL, LLP  
Customer Number 23859  
(678) 420-9300  
(678) 420-9301 (fax)